Foundations of Public Law

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I. The Ambiguous Character of the Rule of Law

Modern constitutional development has been driven by a dynamic between power and liberty. Since the powers of government in the modern era are extensive, the key political value of liberty can be maintained only by ensuring that these powers are confined, channelled, and checked. This is one of the basic functions of modern constitutions. Written constitutions exist to maintain a balance between the conferral of powers on government and the preservation of the liberties of the individual.

For this critical function of modern constitutions to be realized, three basic principles must be accepted. The first is that the constitution be recognized as the medium through which all governmental power is exercised; this is the principle of *constitutional supremacy*. The second principle is that the law of the constitution is acknowledged as the *fundamental law* of the land. And the third is that the judiciary, through *judicial review*, acts as the ultimate guardian of the constitution. Despite various controversies over their application, these are widely accepted as basic principles of modern constitutionalism. But once adopted, a critical question presents itself: can it now be said that the law not only guides and constrains but also rules? This is the idea animating the English expression, 'the rule of law'. Is the rule of law an essential fourth principle—or, indeed, the overarching meta-principle—of modern constitutionalism? Or is this phrase simply a rhetorical formulation with no practical consequences?

There are good reasons for believing that the rule of law is merely a slogan. However laudable its underlying intentions, the goal of achieving a 'government of laws and not of men' remains an impossibility. One compelling reason derives from the fact that law in the modern era is universally acknowledged to be a human creation. It is not possible to conceive that law could be placed above human will: it can never be placed above a 'government of men'.[1] A second reason is that laws cannot be said to rule, for the obvious reason that ruling involves action, and laws, in themselves, do not act. The rule of law, it would appear, is

[1] As noted in ch 5 above, 132, Rousseau regarded the problem of realizing the rule of law as being analogous to that of squaring the circle in geometry: unless solved, he stated, 'you may be sure that whenever you believe you have made the laws rule, it will be men who will be ruling'.

mere rhetoric, a conviction which is reinforced by its intrinsic ambiguity: the ubiquity of the expression 'the rule of law' is matched only by the multiplicity of its meanings.[2]

This intrinsic ambiguity is evident when one looks at the influence of the expression across a range of legal traditions. The English idea of 'the rule of law' finds its correlative formulations in continental European concepts of *Rechtsstaat, l'Etat de droit, Stato di diritto, Estado de derecho,* and so on. But it is evident that these phrases have a different orientation, not least because in them the concept of the state forms its core. These continental formulations highlight a specific conundrum: although the state, as the source of law, is competent to define its own competences, the concept of 'the state of law' means that the state acts only by means of law, and is therefore also subject to law. The state that is the source of law is also, apparently, the subject of law.

This conceptual puzzle is not the only difficulty presented by continental European formulations. Formulations such as *Rechtsstaat* and *l'Etat de droit* have emerged from different constitutional traditions with different political histories. Despite the similarity of their formulations, these expressions are not direct equivalents.[3] But even if we stick with the original German notion, the *Rechtsstaat* presents itself as no less an ambiguous expression than that of the rule of law. The doctrine has been used to justify a wide variety of governing regimes,[4] and it has been estimated that over 140 legal concepts operating in the German legal system are claimed to be aspects of the *Rechtsstaatprinzip*.[5] Schmitt noted that the term

[2] JN Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987), 1–16, 1: 'It would not be difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians'.

[3] Cf Ernst-Wolfgang Böckenförde, 'The Origin and Development of the Concept of the *Rechtsstaat*' in his *State, Society and Liberty: Studies in Political Theory and Constitutional Law* JA Underwood (trans) (New York: Berg, 1991), 47–70, 48: '*Rechtsstaat* is a term peculiar to the German-speaking world; it has no equivalent in any other language.... The 'rule of law' in Anglo-Saxon law is not in substance a parallel concept, and French legal terminology has no comparable words or concepts whatever'.

[4] This even includes the legal ordering of the Third Reich: see, eg, Ulrich Schellenberg, 'Die Rechtsstaatskritik: Vom liberalen zum nationalen und nationalsozialistchen Rechtsstaat' in Ernst-Wolfgang Böckenförde (ed), *Staatsrecht und Staatsrechtslehre im Dritten Reich* (Heidelberg: CF Müller, 1985), 7188; Carl Schmitt, 'Der Rechtsstaat' [1935] in his *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916–1969* (Berlin: Duncker & Humblot, 1995), 108–120.

[5] Katharina Sobota, *Das Prinzip Rechtsstaat* (Tübingen: Mohr Siebeck, 1997), 471–526, who identifies 142 individual characteristics of the rule of law, including: legal bindingness of the constitution (*Rechtsverbindlichkeit der Verfassung*: §12), validity of fundamental rights independent of majority decisions (*Geltung der Fundamentalrechtsnormen unabhängig von Mehrheitsentscheidungen*: §15), prohibition of arbitrariness (*Willkürverbot*: §38), rationality (*Rationalität*: §41), division of powers (*Gewaltenteilung*: §48), local self-government (*Kommunale Selbstverwaltung*: §53), legality (*Gesetzlichkeit*: §55), legal certainty, (*Bestimmtheitsprinzip*: §64), accountability (*Verantwortlichkeit*: §76), non-retrospectivity (*Rückwirkungsverbote*: §96), judicial independence (*Unabhängigkeit des Richters*: §102), effective rights protection (*Effektiver Rechtsschutz*: §125), and proportionality (*Verhältnismäßigkeit*: §138).

'*Rechtsstaat*' 'can mean as many different things as the word "law" [*Recht*] itself and, moreover, just as many different things as the organizations connoted by the term "state" [*Staat*]'. There is 'a feudal, an estate-based, a bourgeois, a national, a social, and further a natural-law, a rational-law, and a historical-legal form of *Rechtsstaat*'. Advocates thus 'claim the word for their own purposes, in order to denounce the opponent as the enemy of the *Rechtsstaat*'. As used in constitutional theory, Schmitt argued that the concept of the *Rechtsstaat* boils down to the mere claim that 'Law should above all be what I and my friends value'.[6]

In such circumstances, precision in public law might demand abandonment of these concepts altogether in favour of a less-charged investigation into the nature of the relationship between state, constitution, governing, and law. The difficulty is that the ubiquity of the expression 'rule of law' demands that it be examined in order to reveal its underlying values and to assess the claim that it is a foundational element of the discipline. In this chapter, the origins of these expressions in English, German, and French thought will be examined. My argument will be that although a coherent formulation of the general concept can be devised, this formulation is entirely unworkable in practice. The rule of law therefore cannot be conceived as a foundational concept in public law. So far as it has any use, it must be deployed with precision, especially because the fact that it is unrealizable in practice renders it peculiarly susceptible to being used for ideological purposes. The concept has value only for its aspirational qualities. Nevertheless, the extent to which the directing idea can be realized is an essentially political task.

II. Origins

Our initial assumption should be that the rule of law refers to some common phenomenon or aspiration.[7] Whatever its precise meaning, the concept we are seeking to fix on is a modern phenomenon. It presents itself for consideration only with the birth of sovereignty. The concept of the rule of law emerges as a product of the formation of the modern state.[8] Despite having a common source, the way the rule of law presents itself as meta-legal principle varies according to the

[6] Carl Schmitt, *Legality and Legitimacy* [1932] Jeffrey Seitzer (trans) (Durham, NC: Duke University Press, 2004), 14.

[7] See, eg, D Neil MacCormick, 'Der Rechtsstaat und die rule of law' (1984) 39 *Juristenzeitung* 65, 67: '*Es fragt sich also, ob wir wirklich zweierlei Grundprinzipien benötigen—die einen für den Rechtsstaat und die anderen für die rule of law. Oder genügen die gleichen Grundprinzipien für beide Begriffe? Meine Meinung ist, daß beide Begriffe durch die gleichen Grundprinzipien konstituiert sind*' ('The question therefore is whether we really need two types of basic principles—one for the *Rechtsstaat* and the other for the rule of law. Or do the same basic principles suffice for both concepts? In my opinion, both concepts are constituted through the same basic principles').

[8] See Blandine Kriegel, *The State and the Rule of Law* Marc A Le Pain and Jeffrey C Cohen (trans) (Princeton, NJ: Princeton University Press, 1995), 42: 'Human liberty arises from the modern and antidominial conception of power, and it is tied to the notion of a social contract and to a conception of rights as law. Rights are guaranteed by the form of the state'.

different histories, cultures, and practices of European governing regimes. The first task in seeking to understand the concept must therefore be to examine some of these histories. I do so by focusing on the English, German, and French cases.

The English concept of the Rule of Law

The concept of the rule of law was introduced into English constitutional discourse only in the latter half of the nineteenth century. First formulated by Hearn,[9] it achieved its classic (though rather imprecise) formulation by Dicey. In his *Law of the Constitution* of 1885, Dicey identified three guiding principles which underpinned the British constitution: the legislative sovereignty of Parliament, the universal rule throughout the constitution of ordinary law, and the role that conventions play in the ordering of the constitution.[10] Liberty, he argued, is preserved by maintaining the balance that is already implicit in these guiding principles.

Although the doctrine of parliamentary sovereignty seems to be 'an instrument well adapted for the establishment of democratic despotism',[11] Dicey claimed that once the way that sovereignty interlocks with the principle of the rule of law is grasped, the doctrine is seen to promote liberty. His point can be illustrated from both angles. He maintained that 'the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of law', and the reason for this is that 'the commands of Parliament... can be uttered only through the combined actions of its three constituent parts'.[12] Here, he was indicating that the necessity of achieving an accommodation between monarch, lords, and commons establishes a series of internal balances and restraints. Similarly, Dicey contended that the rule of law upholds the principle of parliamentary sovereignty because the 'rigidity of the law constantly hampers... the action of the executive, and... the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land'.[13]

Dicey's concept of the rule of law is closely tied to the idea that, acting in partnership, Parliament and the courts are the true sources of law within the British constitution.[14] In this interpretation, the rule of law presents itself as an adjunct

[9] WE Hearn, *The Government of England: Its Structure and Development* (London: Longmans, 1867), 89–91.

[10] AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885) (London: Macmillan, 8th edn, 1915), 34.

[11] AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1905), 305.

[12] Dicey, above n 10, 402.

[13] Ibid, 406.

[14] From this relationship, the peculiarly British understanding of the idea of the separation of powers can also be derived: see *Duport Steels v Sirs* [1980] 1 All ER 529, 541 (per Lord Diplock): 'it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them'.

to the principle of parliamentary sovereignty, so becoming an expression of the idea of 'the legislative state'.[15]

But Dicey's formulation of the concept is not without its ambiguities. He suggested that the rule of law had three main meanings. First, it meant the 'absolute supremacy . . . of regular law as opposed to the influence of arbitrary power'. Secondly, it meant equality before the law, or 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts'. Finally, the concept was a formula for expressing the fact that in the English system 'the principles of private law have . . . been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants'. That is, 'the constitution is the result of the ordinary law of the land' and that 'the law of the constitution . . . [is] not the source but the consequence of the rights of individuals'.[16] The first meaning appeals to the idea of law as a set of general rules of conduct and the second invokes the principle of universality; these express a general liberal orientation. But the third meaning is culturally specific. By linking the concept to the particularities of English constitutional history, Dicey suggests that the rule of law is a product of the common law tradition.

Dicey explicated the rule of law not so much as a universal aspiration but as the distinctive achievement of a particular—perhaps unique—constitutional tradition. It was for this reason that Shklar maintained that in Dicey's work the concept was 'both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it'.[17] Dicey's formulation of the concept of the rule of law amounted to an 'outburst of Anglo-Saxon parochialism', which tied the concept directly to the common law's achievement in rejecting the distinction between public law and private law.[18]

[15] Dicey's concept of the rule of law can thus be understood to be very close to Schmitt's concept of 'a parliamentary legislative state' (*ein parlamentarischer Gesetzgebungsstaat*) in which 'the lawmaker, and the legislative process under its guidance, is the final guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality, and the last security and protection against injustice': Schmitt, above n 6, 19. Schmitt argues, however, that although the 'legislative state' could present itself as a *Rechtsstaat*, 'the word *Rechtsstaat* should not be used here': ibid, 14. Schmitt's argument is given added force by Dicey's lament in the last edition of *Law of the Constitution* in 1915 that 'faith in parliamentary government has suffered an extraordinary decline' and that the 'ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline': Dicey, above n 10, xcii, xxxviii. Cf Schmitt, above, 23–24 who argues that when the domestic situation is normal and confidence in the legislative organ remains unshaken then faith in legality is not placed in issue, but that in a democracy the concept of law must, on this understanding, become 'the will of a transient majority of the voting citizenry'. Dicey himself expressed a concern about majoritarianism (what he called 'class legislation') and believed that the balance in the British constitution could be maintained by the British practice of 'democracy tempered by snobbishness': Dicey, above n 11, 57. On Dicey, see further, Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992), ch 7; PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990), ch 1.

[16] Dicey, above n 10, 198–199. [17] Shklar, above n 2, 6. [18] Ibid, 5.

Dicey's concept was tied directly to the particularities of English constitutional history. By claiming that the English possess a judge-made constitution,[19] he also promoted a highly conservative interpretation of constitutional history. He believed that true rights are not to be found in paper constitutions. Rights contained in written constitutions are 'something extraneous to and independent of the ordinary course of the law' and, since they owe their status to that constitution, they can be suspended.[20] In the English tradition, by contrast, rights derive from the generalization of precedents expressed in the ordinary law of the land. The great value of such rights is that they 'can hardly be destroyed without a thorough revolution in the institutions and manners of the nation'.[21] In this understanding, the rule of law in the English tradition represented for Dicey not the rule of the legislative state but the rule of judicature.[22]

Dicey's concept of the rule of law is rich, intricate, and ambiguous. One aspect of it bolsters the doctrine of parliamentary sovereignty and—but for the internal balances in the parliamentary system—is authoritarian. Although the rigidity of the law restrains the exercise of governmental power, this aspect expresses the principle of rule *by* law. A second aspect of Dicey's concept, extolling the principle of equality before the law, is an expression of classical liberalism, which does not take us beyond the principle of rule by law. Yet a third aspect draws on the peculiarities of the common law tradition working through an ancient idea of a constitution; this expresses the 'rule of reason'[23] and draws on the need to place trust in the judiciary as guardians of the implicit values of a distinctive constitutional tradition.[24]

The German concept of *Rechtsstaat*

The analogous German concept of *Rechtsstaat* emerged earlier than the English expression, in relation to different governmental circumstances. The term came into use during the first half of the nineteenth century. Just as Dicey's elaboration of the rule of law revealed tensions between liberalism and conservatism in the British constitution, so the *Rechtsstaat* concept appeared in the writing

[19] Dicey, above n 10, 192–193: 'There is in the English constitution an absence of those declarations of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet specific grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. . . . [I]n England, . . . the constitution itself is based on legal decisions'.

[20] Ibid, 196. [21] Ibid, 197.

[22] See Ernest Barker, 'The Rule of Law' (1914) 1(2) *Political Quarterly* 117–140.

[23] See Aristotle, *The Nicomachean Ethics* [c334–323 BC] JAK Thomson (trans) (Harmondsworth: Penguin, rev edn, 1976), Bk V.

[24] See Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000), ch 5.

of German jurists as an attempt to reconcile modern claims of liberty with traditional authoritarian governing arrangements.

Initially, the term *Rechtsstaat* was used as 'a descriptive category applicable to all modern states which used general laws to harmonize the sovereign concentration of political power with liberal policy'.[25] This suggests that the term meant nothing more than rule by law. But ambiguities in the use of the term were evident from the outset, with the reactionary Adam Müller and the liberal Carl Theodor Welcker each using the expression (in 1808 and 1813 respectively) for the purpose of justifying the reconstruction of government after pressures to modernize. While diverging in their political objectives, they shared the belief that *Rechtsstaat* was the 'state of reason'.[26] This general expression was elevated to the status of doctrine only through the systematic work later undertaken by Robert von Mohl.[27]

Mohl's account of *Rechtsstaat* contained three main elements. First, it rejected the idea that political order is divinely ordained: governmental order was the product of earthly aims of free, equal, and rational individuals. Secondly, the aim of a governing order must be directed towards the promotion of the liberty, security, and property of the person, though this general aim also encompassed those policing functions that provided a platform of regulation and protection. Thirdly, that the state should be rationally organized, a claim incorporating the principles of responsible government, judicial independence, parliamentary representation, rule by means of law, and recognition of basic civil liberties.[28] The lineage of Mohl's account can be traced back to Kant's attempt to reconcile the establishment of order with the maintenance of freedom, particularly since, in Kant's theory, law was the medium through which reconciliation was achieved.[29] In Mohl's account, *Rechtsstaat* stood in direct contrast to both the absolutist state and the police state (*Polizeistaat*).

This Kantian explanation of both Mohl's particular argument and the general approach to the concept of the *Rechtsstaat* in the early-nineteenth century is neither straightforward nor uncontroversial. One difficulty with it is that Mohl was

[25] Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Chicago: University of Chicago Press, 1957), 253.

[26] Adam Heinrich Müller, *Elemente der Staatskunst* (Berlin: JD Sander, 1809), vol I, 1–35; Carl Theodor Welcker, *Die letzte Gründe von Recht, Staat, und Strafe* (Gießen: Heyer, 1813), 25; discussed in Krieger, above n 25, 253–256; Michael Stolleis, *Public Law in Germany, 1800–1914* (New York: Berghahn, 2001), 103–106, 131–132.

[27] Robert von Mohl, *Das Staatsrecht des Königsreichs Württemberg* (Tübingen: Laupp, 1829); Robert von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* [1832] (Tübingen: Laupp, 3rd edn, 1866); discussed in Sobota, above n 5, 306–319.

[28] See the synthesis of Böckenförde, above n 3, 49–50.

[29] Immanuel Kant, *Metaphysical Elements of Justice* [1797] (Part I of the *Metaphysics of Morals*; known as the *Rechtslehre*) John Ladd (trans) (Indianapolis: Hackett, 1999), §45 (118): 'A state (*civitas*) is a union of a group of persons under the laws of justice'. Stolleis has noted that already in the 1790s Kant and his followers had been designated as '*die Schule der Rechts-Staats-Lehre*': Michael Stolleis, 'Rechtsstaat' in Adalbert Erler and Ekkehard Kaufmann (eds), *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Schmidt, 1990), vol 4, 367–375, 375.

no diligent disciple of Kant. In place of Kantian 'negative freedom', for instance, Mohl promoted the idea of freedom through the state: the law-bound state was designed not for the purpose of specifying precise limits to governmental action but to measure such action against the general objective of promoting an individual's complete development.[30] A second complicating factor derives from Kant's rejection of the right of resistance: in German state practice, adherence to the principle of legality became the price rulers paid for the maintenance of authoritarian systems of government.[31] Kantian formulations incorporated significant conservative aspects and under its influence early elaborations of the *Rechtsstaat* concept could not be assumed to rest on liberal foundations.[32]

Tensions between authoritarianism and liberalism in the early formulations of the concept came to a head in the 1848 revolution. The *Paulskirche* national assembly sought to establish the protection of basic rights as the foundational constitutional principle,[33] treating the *Rechtsstaat* concept as a fundamental principle of liberal constitutionalism. With the failure of that revolutionary movement the liberal version was defeated and in the post-1848 period the concept emerged in German regimes as an ambiguous compromise between liberalism and monarchical authoritarianism. Since it was only during the latter-half of the nineteenth century that the doctrine of *Rechtsstaat* was formalized, these methodological ambiguities remained submerged.

[30] In *Polizeiwissenschaft*, above n 27, von Mohl defines the goal of the *Rechtsstaat* as 'the arrangement of the common life of a population such that each member is supported and encouraged in the most free and general exercise and use of his complete powers'. Cited in Stolleis, above n 26, 246 (n 194).

[31] Stolleis, above n 26. Referring to the rule of law (*die Herrschaft des Gesetzes*) as a legislative state (*Gesetzgebungstaat*), Schmitt, above n 6, (at 14), states that the law-maker 'is the final guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality, and the last security and protection against injustice. Misuse of the legislative power and of the lawmaking process must remain out of consideration in practical terms, because otherwise a differently constituted state form . . . would become immediately necessary. The pre-existing and presumed congruence and harmony of law and statute, justice and legality, substance and process dominated every detail of the legal thinking of the legislative state. Only through the acceptance of these pairings was it possible to subordinate oneself to the rule of law precisely in the name of freedom, remove the right of resistance from the catalogue of liberty rights, and grant to the state the previously noted unconditional priority'.

[32] See, eg, the work of Friedrich Julius Stahl, who understood the *Rechtsstaat* as the product of a state comprising the union of a people under a sovereign authority and as an objective expression of that national unity. In Stahl's work the term *Rechtsstaat* defined only the formal means by which the political ends of the state were realized: Friedrich Julius Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht* [1833–1837] (Tübingen: Mohr, 1878), vol 2, 137. Stahl also maintained that that expression of national unity is best expressed through the monarchy: see Stahl, *Das monarchische Prinzip* (Heidelberg: Mohr, 1845), 34: 'the monarchical principle is the foundation of German public law and of the German art of the state' (*'Das monarchische Prinzip . . . is das Fundament deutschen Staatsrechts und deutscher Staatsweisheit'*). See further, Sobota, above n 5, 319–337; Christoph Schönberger, 'État de droit et État conservateur: Friedrich Julius Stahl' in Olivier Jouanjan (ed), *Figures de l'État de droit* (Strasbourg : Presses Universitaires de Strasbourg, 2001), 177–192.

[33] See Krieger, above n 25, 329–340.

These ambiguities inhered in the concept of the state itself. In Bähr's influential exposition, for example, the state was treated as an organic association, and its law-bounded character formulated by way of an evolving functional differentiation into legislative, judicial, and administrative activities.[34] With respect to these functions—especially the growing administrative responsibilities of government[35]—spheres of governmental action were identified as constituted by rules and subject to legal controls.

During the latter-half of the nineteenth century, however, this organic approach was superseded by the emerging legal positivism of Gerber and Laband.[36] For these jurists, the state was conceived as a juristic person which embodied sovereignty, an argument with radical implications. The Kantian liberal approach whereby individuals are bearers of rights by virtue of their humanity and which therefore impose specific limits on the authority of the state had, as a logical necessity, to be rejected. Within the frame of this positivist jurisprudence, rights are created only through objective law: they therefore are entirely conventional concepts. Once this manoeuvre was set in place, the concept of *Rechtsstaat* itself could be subsumed in the concept of *Staatsrecht*.

This development led, in one sense, to the formulation of the first purely juridical concept of *Rechtsstaat*. But in this juridical understanding, rights could not be foundational. Rights do not have natural or pre-state existence, and neither do they have constitutive status; rights are created as a product of legislative action. The concept of *Rechtsstaat* could then be conceived solely in aspirational terms. Jhering was one of the first clearly to identify the consequential difficulties with respect to the relationship between state and law. Since there is no power above the state, how, he asked, could state power be subordinated to a given entity?[37] Jhering's own answer to that question was supplied by the concept of self-limitation (*Selbstbeschränkung*): it was in the state's interest to promote its self-limitation through self-binding to legal norms. And it was this self-limitation that Jellinek later sought to resolve in his two-sided theory of the state, in which a formally sovereign entity was obliged, for the purpose of maintaining its authority, to rely on precepts that emerged from a historical tradition and therefore could only be gradually modified.[38]

[34] Otto Bähr, *Der Rechtsstaat* [1864] (Aalen: Scientia Verlag, 1961); see discussion in Pietro Costa, 'The Rule of Law: A Historical Introduction' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), 73–149, 93–95. Bähr's organic argument was founded on the idea of *Genossenschaft* pioneered by Gierke; see, eg, Otto Gierke, *Political Theories of the Middle Age* FW Maitland (trans) (Cambridge: Cambridge University Press, 1988) (a section of Gierke's *Das Deutsche Genossenschaftsrecht*).

[35] See esp Otto Mayer, *Deutsches Verwaltungsrecht* (Leipzig: Dunker & Humblot, 1895): '*Der Rechtsstaat ist der Staat des wohlgeordneten Verwaltungsrecht*' (The Rechtsstaat is the state with well-ordered administrative law), cited in Stolleis, above n 29, 372.

[36] See above ch 7, 191–192.

[37] Rudolf von Jhering, *The Struggle for Law* [1872] John J Lalor (trans) (Chicago: Callaghan & Co, 1915), esp 21–22.

[38] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd edn, 1922), 476–484. See above ch 7, 192–193; ch 8, 217–218.

The predominance of legal positivism in late-nineteenth-century public law thought meant that the *Rechtsstaat* concept emerged in twentieth-century German jurisprudence as a purely formal principle. Since there could be no legal limitation on the legislative power, the concept denoted only the formalities of the relations between law, government, and individual in which 'the administration may not interfere in the realm of individual liberty either against a law (*contra legem*) or without a legal foundation (*praetor, ultra legem*)'.[39] Here, the concept was no longer a constitutional principle in any strict sense; that is, it lost its connection with foundational aspects of state-building. The idea of 'the rule of law' implicit in the concept of *Rechtsstaat* is therefore limited to that of 'rule by law'.

After the debasement of the concept by the National Socialist regime,[40] the positivist conception of the *Rechtsstaat* became, after 1945, the subject of renewed and often contentious discussion. The context was the framing of a new constitution for the Federal Republic of Germany and the establishment of a Federal Constitutional Court as the guardian of that constitution. Since the court maintained that the constitution embodied a regime of basic values (*Wertgrundlage*) of social life,[41] a tension was established between formal legal liberal protections (epitomized by the positivist *Rechtsstaat*) and the social values implicit in the system of constitutional democracy (epitomized by the post-war concept of the *Sozialstaat*).[42] This tension manifested itself juristically between laws and measures, between the concept of law as a set of general rules, and law as a series of measures (*Maßnahmegesetze*) that regulate social and economic life.[43] This tension was replicated at the level of constitutional discourse in the distinction between the formal and material concepts of *Rechtsstaat*.[44] In such circumstances—in which the concept is given various (often highly politicized) interpretations by certain jurists and altogether jettisoned by others—the concept itself loses authority.

[39] Gerhard Anschütz, 'Deutsches Staatsrecht' in Franz von Holtzendorff and Josef Kohler (eds), *Enzyklopädie der Rechtswissenschaft* (Munich: Duncker & Humblot, 1904), vol 2, 593; cited in Böckenförde, above n 3, 58.

[40] See Böckenförde (ed), above n 4; Michael Stolleis, 'Que significait la querelle autour de l'État de droit sous le Troisième Reich?' in Jouanjan (ed), above n 32, 373–383.

[41] Lüth Judgment of 1958: *Entscheidungen des Bundesverfassungsgerichts*, 7, 198.

[42] On the concept of the *Sozialstaat* and its tensions with the *Rechtsstaat*, see, eg, Mehdi Tohidipur (ed), *Der bürgerliche Rechtsstaat* (Frankfurt am Main: Suhrkamp, 1978); Ernst Forsthoff, 'Begriff und Wesen des sozialen Rechtsstaat' in Forsthoff, *Rechtstaat im Wandel: Verfassungsrechtliche Abhandlungen 1950–1964* (Stuttgart: Kohlhammer, 1964), 27–56.

[43] Ernst Forsthoff, 'Über Maßnahme-Gesetze' in Forsthoff, above n 42, 78–98; Konrad Huber, *Rechtsgesetz und Maßnahmegesetz: Eine Studie zum rechtsstaatlichen Gesetzesbegriff* (Berlin: Duncker & Humblot, 1964).

[44] Konrad Hesse, 'Der Rechtsstaat im Verfassungssystem des Grundgesetzes' in Tohidipur (ed), above n 42, 290–314; Dieter Grimm, 'Reformalisierung des Rechtsstaats als Demokratiepostulat?' (1980) 10 *Juristische Schulung* 704–709. Cf Friedhelm Hase, Karl-Heinz Ladeur, and Helmut Ridder, 'Nochmals: Reformalisierung des Rechtsstaats als Demokratiepostulat?' (1981) 11 *Juristische Schulung* 794–798.

The French concept of *l'Etat de droit*

The French concept of *l'Etat de droit* has an altogether different history. The English 'rule of law' idea was the consequence of an attempt to give a formalized interpretation of the engagement of the common law with modern ideas of constitutionalism, and the German concept of *Rechtsstaat* evolved from the tensions between authoritarianism and liberalism in governmental practice. But the French concept was explicitly introduced by French jurists as a normative principle to highlight perceived deficiencies in post-revolutionary governing arrangements.

By the late-nineteenth century, French public law had come to revolve around the concept of national sovereignty, with the legislative power, conceived as an exercise of the general will, assuming a status of pre-eminence.[45] Only on this basis did French jurists begin to ask whether and how the exercise of all powers of the state, including the legislative power, could be made subject to law.

The jurist who did most to promote the case was Raymond Carré de Malberg. Influenced by the work of the German jurists, Gerber and Laband,[46] Carré de Malberg established as a general principle that the state could act only through law. And, influenced in particular by Jellinek, he argued further that, as a legal entity, the state could, through the concept of self-limitation, bind itself to its own norms.[47]

Developing this thesis, Carré de Malberg drew a distinction between the concepts of *l'Etat légal* and *l'Etat de droit*. The former concept was directed primarily to the administration and ensured that the administration acted according to law; the administration ought to remain subordinate to the legislative authority, locating the source and limitations of its jurisdictional authority in statutory authorization. But *l'Etat légal*, the equivalent of Schmitt's concept of the legislative state or 'rule by law', was fully compatible with the doctrine of national sovereignty formulated in the Third Republic. It was this rather thin account of the law-state relationship that the concept of *l'Etat de droit* sought to supplant. The latter concept grew from the conviction that law exists to protect individual rights and that such rights were only partially protected by the idea of 'rule by law'. The concept of *l'Etat de droit* sought to supply authoritative norms that not

[45] See Marie-Joëlle Redor, *De l'Etat légal à l'Etat de droit. L'évolution des conceptions de la doctrine publiciste française 1879–1914* (Paris: Economica, 1992), 52–59; Guillaume Bacot, *Carré de Malberg et l'origine de la distinction entre souveraineté du peuple et souveraineté nationale* (Paris: CNRS Éditions, 1985).

[46] See PM Gaudemet, 'Paul Laband et la doctrine française de droit public' (1989) 4 *Revue du droit public* 957–979. It might be noted that Carré de Malberg succeeded Laband in the chair of public law at the University of Strasbourg when, after the First World War, Alsace was returned to France.

[47] Raymond Carré de Malberg, *Contribution à la Théorie générale de l'Etat* [1920] (Paris: Dalloz, 2004), vol 1, 228–243. On the moral personality of the state, see also Léon Michoud, *La théorie de la personnalité morale et son application au droit français* (Paris: Librairie Générale de Droit et de Jurisprudence, 1906).

only determined the relationship between administration and individual, but also conditioned the exercise of legislative power.[48]

In the discussion of the concept of *l'Etat de droit* amongst French jurists, it is possible to detect the same tension that evolved in the German discourse between positivist and anti-positivist conceptions. The French debate came to focus in particular on the status of the 1789 Declaration of the Rights of Man and the Citizen within the constitutional framework of the Third Republic. Since the 1875 Constitution had not referred to the 1789 Declaration, questions were raised about its legal status. Positivists such as Esmein and Carré de Malberg maintained that, without specific appendage to the Constitution, the Declaration (being a statement of general principles only) could have no legal effect.

But the positivists were opposed by more sociologically orientated jurists, such as Duguit and Hauriou, who claimed that the principles of the Declaration provided the foundation on which the republic was established and had 'supra-constitutional' status. The Declaration, claimed Hauriou, had not only a legal but also a special constitutional status. Although the claims of the Declaration, being only in the Preamble, are not incorporated in the text of the Constitution, he contended that 'this means that they contain constitutional principles that rank higher in order than the written constitution'.[49]

As a matter of jurisprudence, this debate raises questions of primary importance: is law just a set of formally promulgated rules, or does it embrace the immanent values of a living constitutional tradition? In the French context, this debate had an air of unreality: lacking an institutional frame through which these juristic questions could be addressed (there was, for example, no constitutional court established in the French system with authority to address these matters), it was difficult to see what impact this dispute might have in practice.[50] As a consequence, the concept of *l'Etat de droit* has, in the French system, been addressed primarily in the realm of legal thought rather than in legal practice.

Common origins

There is one common element in the analysis of origins of the concept in the regimes of Britain, Germany, and France: debates over the idea of 'the rule of law' all reached their high point in the period of the late-nineteenth/early-twentieth centuries. Further, although both the constitutional context and the particular

[48] Carré de Malberg, above n 47, vol 1, 488–494; Redor, above n 45, esp 294–316.

[49] Maurice Hauriou, *Précis de droit constitutionnel* (Paris: Sirey, 1923), 245; cited in Alain Laquièze, '*État de droit* and National Sovereignty in France' in Costa and Zolo (eds), above n 34, 261–291, 268. Hauriou's argument has similarities to Schmitt's claim about the existential (absolute) meaning of the constitution: see above ch 9, 212–214.

[50] It should be noted, however, that the *Conseil Constitutionnel*, established in 1958, has significantly altered the institutional landscape and since 1971 the Declaration has been constitutionalized, being used as a principle of constitutional interpretation: see Martin Harrison, 'The French Constitutional Council: A Study in Institutional Change' (1990) 38 *Political Studies* 603–619.

formulation of the concept vary, these debates over the rule of law were fuelled by liberal jurists. These jurists were expressing particular concerns about the impact on the concept of law of the emergence of an extensive governmental system, charged with the tasks of regulating social life and promoting the welfare of the citizen through administrative measures.

The rhetoric of the rule of law did live on into the twentieth century, but its message became more disparate. For some jurists, its claims are entirely illusory, serving only as a justification for the supremacy of the judge over governmental affairs.[51] Others continue to promote the claims of the rule of law, largely as a term that expresses the most basic legal values that modern government must respect.[52] Before considering the contemporary significance of the concept, we must ask whether, regardless of particular political circumstances, the rule of law can form a coherent, foundational concept.

III. Mode of Association

The most profound attempt to explicate the concept of the rule of law as a coherent and foundational concept in public law is that made by Michael Oakeshott.[53] His argument is of particular interest because, by analysing the rule of law in purely conceptual terms, he avoids the now widespread tendency to invoke the term as an ideological slogan.

The basis of Oakeshott's claim is that, as the expression of a specific mode of human association, the concept of the rule of law must be specified in terms of its conditions. The concept envisages humans joined in a relationship specifiable in terms of certain exclusive conditions, namely laws. But what does this entail? As with every mode of association, the subjects united in a relationship are abstractions, persons related to one another only in terms of certain conditions. Oakeshott's aim is to identify the character of this *persona*, and to specify the conditions of this mode of association. This is a complex exercise because human relationships emerge in the course of ordinary living—human practices exist prior to any conscious reflection on their conditions on conduct. Of necessity, then, the idea of the rule of law 'stands for a mode of human relationship that has been glimpsed, sketched in a practice, unreflectively and intermittently enjoyed,

[51] Ernst Forsthoff, 'Rechtsstaat oder Richterstaat?' in Forsthoff, *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen 1954–1973* (Munich: Beck 1976), 243–256; JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1–21; Michel Troper, 'Le concept d'État de droit' (1992) 15 *Droits* 51–63.

[52] Jeffrey Jowell, 'The Rule of Law and its underlying values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6th edn, 2007), ch 1; David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999).

[53] Michael Oakeshott, 'The Rule of Law' in his *On History and Other Essays* (Oxford: Blackwell, 1983), 119–164.

half-understood, left indistinct'. Although reflection is required to reveal its conditions, 'the task of reflection is not to invent some hitherto unheard of human relationship, but to endow this somewhat vague relationship with a coherent character by distinguishing the conditions exactly as may be'.[54]

Oakeshott addresses this mode of association indirectly and by way of contrast. He suggests that the most readily understood mode of human relationship is transactional association. This is the mode of association in which persons engage with one another for the purpose of satisfying particular needs and desires. We recognize this mode of association in a contract for services between buyer and seller. This is intrinsically a power relationship, with the nature of the bargain dependent on the ability to make or refuse offers to transact. Moral or legal considerations may in certain circumstances enter into the actual operations of particular transactions. The point is that such considerations have no bearing on categorial integrity: as an ideal mode, transactional association is geared to the satisfaction of substantive wants.

This transactional mode of association also exists when agents join together to promote some common interest. Rather than transacting with one another, they join together in some guild, fellowship, or community with the common purpose of achieving a desired substantive condition. Association here, says Oakeshott, 'is the assemblage of an aggregate of power to compose a corporate or an associational identity designed to procure a wished-for satisfaction'.[55] That is, the agents undertake to devote a proportion of their time, energy, or resources to the pursuit of a common cause. The undertaking therefore involves an aggregation of power deployed towards the efficient achievement of certain ends. Since the pursuit of this general objective may require elaborate arrangements, formal organizational structures—articles of association, offices of responsibility, the making of a constitution—may be necessary. But such arrangements 'are no more than the prudential disposition of the available resources, instrumental to the pursuit of the common purpose and desirable in terms of their utility, which itself lies in their uninterrupted functionality'.[56] Once again, the fact that certain associates recognize moral or legal considerations in conduct does not qualify the arrangement as a distinct mode of association: as a *mode* of association 'there is only Purpose, Plan, Policy and Power'.[57]

Oakeshott's objective in introducing the transactional mode of association is to explain that it is categorially distinct from the mode of association in which associates are exclusively related in terms of law. To advance his argument, he considers the relationship entailed in the playing of games. If we treat persons involved in a game as competitors, the game can be viewed as a purposive enterprise: since the objective is to win, the game involves the pursuit of a desired

[54] Ibid, 120–121. Related to this claim of immanence is the conviction that the 'laws' that declare the conditions of this human relationship are not like scientific laws of chemistry or physics; they are inventions that specify an ideal character.

[55] Ibid, 123. [56] Ibid, 124. [57] Ibid, 125.

substantive satisfaction. And since competitors relate to one another in terms of relative skill needed to achieve success, the game is also a power relationship. While the skill needed for success can be formulated in rules ('always hold the bat straight'), these are generally prudential considerations and the essence of the skill is conveyed by way of instrumental precepts.

But Oakeshott argues that alongside the understanding of a game as a purposeful enterprise is the identification of a game simply as a game. It is a set of rules conceived neither as guides to the effective use of power nor as commands to do or forbear, but solely as those rules that constitute the game itself. For persons to be related in terms of these rules 'is to be related in a mutual obligation to observe the conditions which themselves constitute the game, an obligation which cannot be evaded on the grounds of disapproval of or conscientious objection to what they prescribe and which may be symbolically expressed in deference to their custodian: an umpire or a referee'.[58] So the rules of a game are identified not only with respect to the desirability of the conditions they prescribe, but also with respect to their authenticity. For those involved in the game, the authenticity of a rule is all that matters. Particular rules might be thought undesirable, but cannot be said to be unfair: fair play 'does not invoke considerations of "justice"; it means neither more nor less than to play *this* game conscientiously according to its authentic rules'.[59]

Oakeshott's point here is that the players of a game are related in two categorially distinct modes of association. One is an actual and limited relationship between real contestants, in which they seek a substantive outcome, namely to win. The other is an ideal relationship that may be invoked in a particular contest but exists independently of it; it is the mode of association understood expressly and exclusively in terms of the recognition of rules. Only by focusing on the latter are we are able to glimpse the idea of the rule of law.

This idea of a game understood purely in terms of its rules offers us a simplified illustration of the mode of association characterized by the rule of law. It is simplified for four main reasons: first, the engagement in a game is intermittent and a matter of choice; secondly, the engagement provides for the satisfaction of a singular nature, sought at a particular moment in time; thirdly, the actions to which the rules relate are generally few and simple, as are the rules themselves; and, finally, the rules are the arbitrary conditions of an autonomous engagement, making any inquiry into the authenticity of the rules, beyond a reference to the rulebook itself, a difficult and possibly pointless exercise. For the purpose of coming closer to 'rule of law' association, Oakeshott proposes that we consider a less-intermittent mode of association such as is found in what may be termed 'moral association'.

Before considering moral association, we must first distinguish between rules and other types of utterances (such as instructions, precepts, and maxims) that

[58] Ibid, 126. [59] Ibid, 127.

offer guidance and advice. The latter types differ from rules in that their recommendations are prudential, and the validity of an utterance is intrinsically linked to its utility in realizing some substantive satisfaction. The validity of a rule, by contrast, does not rest on its ability to realize some purpose; instead, it lies simply in its authenticity as a rule situated within some rule-based scheme. Consider, for example, the distinction between rules and commands. Commands are addressed to identifiable agents, whereas rules govern any who may fall within their jurisdiction. Commands are responses to particular circumstances, whereas rules exist in advance of hypothetical situations which they may later be found to cover. Commands are injunctions to perform actions and require obedience, whereas rules assume agents wishing to perform self-chosen actions and stipulate conditions for the adherence to such action. Commands—as distinct from demands—are utterances whose validity depends on their authority, which is determined by reference to rules; commands therefore postulate association in terms of rules. If this last distinction sheds some light on the relationship between commands and rules, we might also note that there can be a substantive aspect to rules. Thus, although rules carry obligations based on their authenticity, distinct from the substance of what they prescribe, they can be evaluated not merely in terms of their consistency within a given rule-based scheme, but also 'as a contribution to the shape of this set of rules as the desirable conditions of an invented pattern of non-instrumental human relationships'.[60] In a simple game, this evaluative engagement is likely to be strictly limited, but in more complex modes of association, this engagement could be extensive. Moral association is one such engagement.

Moral association, Oakeshott states, 'is relationship of human beings in terms of the mutual recognition of certain conditions which not only specify moral right and wrong in conduct, but are prescriptions of obligations'.[61] Agents are related transactionally in performing actions to realize their wants. But they are also under obligations to observe conditions that are neither instrumental to the satisfaction of wants, nor have their own substantive purpose. As a more complex mode of association, a morality is not entirely constituted by its rules. A morality 'is not a list of licences and prohibitions but an everyday practice'; it is 'a vernacular language of intercourse' which, like all language in use, 'is neither fixed nor finished'. It can be 'criticized and amended in detail' but 'never rejected *in toto*' and 'moral conduct, conduct in respect of its recognition of the conditions of a morality, is a kind of literacy'. Further, 'just as considerations of literacy do not themselves compose utterances, and just as a practice can never itself be performed, so we may act morally but no actual performance can be specified in moral terms'.[62]

The essential point Oakeshott makes here is that a morality is not entirely constituted by its rules. The point needs emphasizing since a moral practice is often

[60] Ibid, 131. [61] Ibid, 132. [62] Ibid, 133.

abridged and presented as a set of rules, and this can be a source of confusion. When this confusion occurs, it should be noted, the rules to which moral practice might be reduced are not prudential directions or instructions; they exhibit all the characteristics of rules as contrasted to commands. Even so, difficulties persist. One concern is that if a moral practice is reduced to rules, it seems as though moral considerations are being converted into 'mere protocol'.[63] Another is that the unavoidable indeterminacy of rules will lead inevitably to casuistry in the application of rules to circumstances. The main problem, however, concerns 'the difficulty of determining the authenticity of an alleged moral rule and of distinguishing this from the recognition of the "rightness" of the conditions it prescribes'.[64] This last difficulty may not be a major problem in the case of a game, where the question of authenticity can be resolved by consulting the rulebook. But 'in respect of a morality reduced to rules, where both authenticity and "rightness" are prime and contentious considerations, there is no easy solution', and in such circumstances many moralists may be inclined to abandon authenticity in favour of 'rightness' as the ground of moral obligation.[65]

By moving from the consideration of transactional association, through simple games and on to moral association, Oakeshott's objective is to offer a definition of the rule of law. The expression, he argues, 'stands for a mode of moral association [conceived] exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of self-chosen actions of all who fall within their jurisdiction'.[66] This is a highly formal definition, especially since association in respect of the rule of law cannot be association to promote a substantive satisfaction. Neither can the relationship be forged by common recognition of 'the desirability of the conditions prescribed in all or any of the laws, or of some quality of "rightness" or "justice" or "reasonableness" they may be deemed to possess'. The sole term of the relationship constituted by the rule of law, he claims, is recognition of the authority or authenticity of the laws.

The most basic criteria of this mode of association are that associates know what the laws are and that a procedure exists for determining the authenticity of the rules. These criteria are realized only where laws have been deliberately enacted or may be deliberately repealed; this mode of association therefore requires the establishment of a 'sovereign' legislative office. But the rule of law does not prescribe any particular constitution of this office. All that is required is that, since the authority of the office cannot be identified with the natural qualities (wisdom, charisma, virtue) of its contingent occupants, it must be an endowment of the office itself.

[63] Ibid, 134–135. The problem here is that it 'invites the revulsion in which it is translated into a meaningless assemblage of absolute "rights", or the nonconformity which seeks release in a claim to be obligated by "conscience", or in the declarations of a self-conscious "immoralist" who thinks that these precise rules of grammar somehow stand in the way of his having a "style" of his own'.

[64] Ibid, 135. [65] Ibid. [66] Ibid, 136.

Although authority of the laws, derived from authenticity of enactment, is the most basic condition, the conditions that laws impose on conduct have other qualities. The most important is that of the justice of their requirements: the *jus* of *lex*. This argument about the *jus* of *lex* parallels the difficulty of identifying moral association in terms of a code of rules. As a mode of association specified in terms of laws, the rule of law must be one in which '*lex* (a rule understood in terms of its authenticity) and *jus* (a rule understood in terms of its "rightness" or "justice" of what it prescribes) are both recognized but are not confused'.[67]

Oakeshott makes it clear that the *jus* of *lex* is not concerned with the manner in which the legislative office is established; the claims of democracy, for example, form no part of these concerns. It cannot be identified with success in promoting the common good, that is, with an increase in welfare or the fairness of distribution of such benefits. Neither is it related to the universal recognition of certain basic goods (bodily integrity, freedom of speech, etc) that are claimed as conditions of human flourishing. The *jus* of *lex* must comprise moral, non-instrumental considerations.

It might be felt that other criteria need to be included in these considerations, such as the need to ensure that laws are not secret or retrospective, or that the only obligations imposed on associates be by way of laws, or that all associates be equally subjected to these obligations. But Oakeshott argues that strictly speaking these are not considerations of *jus* but are inherent in the idea of *lex*. So what are these considerations?

Oakeshott notes that most theorists here fall back on an inherently just 'higher' or 'fundamental' law, a law of nature or of God, whether found in rational moral deliberation or in the will of some divine legislator. This raises speculation about the requirements of such fundamental law. But for Oakeshott the *jus* of *lex* must be sought 'in its relation to the provisions of a genuine law which (therefore) is concerned, not with the approval or disapproval of actions, but with the prescription of conditions to be observed in performing self-chosen actions, and which differ from the provisions of *lex* only in respect of their greater generality'.[68] This is less than crystal clear. The *jus* of *lex* does not involve the search for overarching 'fundamental values' or an inviolable set of 'human rights', because that would reduce considerations of *jus* into substantive satisfactions. But it is also logically impossible that 'the necessarily conditional prescriptions of *lex* can derive their *jus* from their conformity (or absence of conflict) with a set of unconditional "values", "rights" or "liberties", etc'.[69]

Oakeshott is adamant that this search for unambiguous and universal criteria of the *jus* of *lex* is beside the point; whether or not such criteria are attainable, the rule of law has no need of them. The rule of law draws a distinction between *jus* and the procedural considerations for determining the authenticity of *lex* and recognizes formal principles of a legal order. But beyond this, Oakeshott says, the

[67] Ibid, 136. [68] Ibid, 142. [69] Ibid.

rule of law 'may float upon the acknowledgement that the considerations in terms of which the *jus* of *lex* may be discerned are neither arbitrary, nor unchanging, nor uncontentious, and that they are the product of a moral experience which is never without tensions and internal discrepancies'.[70] Specifying the *jus* of *lex* turns out to be a more fluid and ambiguous undertaking than might have been envisaged. It is 'not a set of abstract criteria but an appropriately argumentative form of discourse in which to deliberate the matter; that is, a form of moral discourse, not concerned generally with right and wrong in human conduct, but focused narrowly upon the kind of conditional obligations a law may impose, undistracted by prudential and consequentialist considerations, and insulated from the spurious claims of conscientious objection, of minorities for exceptional treatment and, so far as may be, from current moral idiocies'.[71]

Armed with this account of the rule of law, Oakeshott returns to the offices necessary to this mode of association. Laws 'are unavoidably indeterminate prescriptions of general adverbial obligations' which 'subsist in advance and in necessary ignorance of the future contingent situations to which they may be found to relate'. Since they are unable to declare their meaning in respect of any circumstantial situation, a second necessary condition of the rule of law—in addition to the legislator—must be an office with authority to rule on actual situations solely in respect of their legality, and to assign a remedy for inadequate performance. This is the office of judiciary, in which a court reaches a conclusion on whether a breach of the law has occurred with respect to some actual occurrence. Judicial deliberation, he contends, involves an 'exercise in retrospective casuistry' which, like all casuistical enterprise, 'is a devious engagement'.[72] But it is governed by rules and conventions designed to focus on the relevant considerations; it may not regard itself as a custodian of a public policy and 'knows nothing of a "public interest" save the sum of the obligations imposed by law'.[73] There is a final condition of association: executive power, or 'offices equipped with procedures composed of rules and authorized to compel the performance of the substantive actions commanded by a court of law, and custodians of "the peace" '.[74]

Oakeshott here presents a systematic account of the rule of law as a coherent and foundational concept. The rule of law denotes 'both a strict and an unexacting relationship' concerning a relationship of *personae* rather than persons, of association not designed for the purpose of procuring substantive satisfactions but of common obligation to non-instrumental rules, and of a set of rules recognized not in terms of their values (ie, their rationality, fairness, or justice) but of their authenticity. It is a mode of association created as a product of human imagination. But can it be more than a logician's dream? Can this ideal mode of human association form the basis of a practical engagement?

One starting point is to show how the ingredients of such an association are created and assembled. If we turn to the European experience, we see that the

[70] Ibid, 143. [71] Ibid. [72] Ibid, 145. [73] Ibid, 146. [74] Ibid, 148.

states of modern Europe emerged from a variety of medieval realms and principalities. In the process of forging a modern state, each set about framing a 'law of the land' from the miscellany of laws it had contained. These states recognized rulership as different from a proprietorial inheritance of property; rather, it was an office charged with particular responsibilities. But this experience does not take us very far. One difficulty is the survival within the modern office of the ruler of the idea of lordship. Another is the fact that the modern state does act as an enterprise association, united in the pursuit of a common purpose, whether that be the exploitation of the natural resources of its territory or the well-being of its members. In addition to these characteristics of modern political association, difficulties also exist in the idea of law that permeates this tradition.

For much of their history, modern European states have represented themselves as ruled not merely by the *jus* inherent in *lex*, but by *jus* in the extended sense of a natural, rational, or higher law. This difficulty is not dissipated by a recent tendency to formulate abstract notions of *jus* as positivized principles in the form of bills of rights or a basic law. To engage the *jus* of *lex*, Oakeshott contends, is to address a particular type of moral consideration: 'neither an absurd belief in moral absolutes (the right to speak, be informed, to procreate and so on) which should be recognized in law, nor distinction between rightness and wrongness of actions in terms of the motives in which they are performed, but the negative and limited consideration that the prescriptions of the law should not conflict with a prevailing educated moral sensibility capable of distinguishing between the conditions of "virtue", the conditions of moral association ("good conduct"), and those which are of such a kind that they should be imposed by law ("justice")'.[75] The *jus* of these conditions involves 'a combination of their absolute faithfulness to the formal character of law and to their moral-legal acceptability, itself a reflection of the moral-legal self-understanding of associates which . . . cannot be expected to be without ambiguity or internal tension—a moral imagination more stable in its style of deliberation than in its conclusions'.[76]

Oakeshott argues that the idea of a state animated by adherence to the rule of law is deeply rooted in European civilization, but it is difficult to see that idea at work today. Pioneered by Bodin and Hobbes, the presuppositions of this understanding of the 'law-governed state' were, he explains, 'fully explored in Hegel', who rejected the idea of natural law as the measure for gauging the justice of the laws, and the presuppositions can be seen operating in 'a slimmed-down version in the writings of the jurist Georg Jellinek' and also in some of the positivist modern jurists.[77] Oakeshott offers us what is probably the most rigorous and coherent account of the concept of the rule of law as a foundation of public law. Nevertheless, his concept serves only to highlight how far removed we are today from the conditions of its realization.

[75] Ibid, 160. [76] Ibid, 160–161. [77] Ibid, 162.

IV. The Rule of Law as Liberal Aspiration

Oakeshott's analysis suggests that the rule of law is a coherent concept only when three basic conditions are accepted. The first is that collective human association—the state—is conceived purely as a type of moral association, rather than as a collective association seeking the realization of some desired goal. The second is that the nature of this type of association counts as an expression of the rule of law only if one conceives it as analogous to a game viewed from what Hart calls 'the internal point of view'.[78] Just as games are constituted by a set of rules, so too must the state be understood as an entirely rule-based association. The third condition requires us to grasp the ineffable idea of the *jus* of *lex*. This appeals to the conditions of justice implicit in the idea of law which prevent the rule of law being reduced to a purely formalistic notion and, at the same time, it resists the importation of substantive values derived from natural law (eg, bodily integrity) or conventional politics (eg, democracy). In outlining the conditions of the rule of law, Oakeshott portrays the state as a nomocracy.

These conditions of nomocratic order are incapable of realization in practice. Even Oakeshott recognizes that the modern European state is itself built on 'an unresolved tension between... two irreconcilable dispositions', one a type of moral association and the other a form of transactional association.[79] The practical question, then, is whether Oakeshott's concept of the rule of law can serve as a measure against which the laws and practices of modern states may be evaluated.

To address this question, it is necessary to differentiate more precisely between two aspects of the concept which until now have only been mentioned in passing. This is the distinction between 'rule by *law*' and '*rule* of law'. Each aspect is implicit in the concept of the rule of law, but they are not often clearly distinguished. My argument will be that, especially in the classical liberal treatment of the concept, these two aspects deal with different questions and pull in different directions. *Rule by law* focuses on the qualities inherent in the concept of law. *Rule of law* addresses a more explicitly political issue, namely the desirability of establishing a fully institutionalized governing order in which everyone has an incentive to act in accordance with the rules. The differences between these two aspects of the concept are quite marked in classical liberal approaches to the rule of law. Each aspect requires separate consideration before the underlying liberal assumptions can be reassessed.

Rule by law

At its most basic, the rule of law means the rule of *the* law. In this understanding, law is the essential means through which the business of governing is

[78] HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 55–56.

[79] Michael Oakeshott, 'On the Character of a Modern European State' in his *On Human Conduct* (Oxford: Clarendon Press, 1975), 185–326, 201. See above ch 6, 159–163.

conducted. This is the core meaning of the expression, 'government according to law': government must be able to specify a law that authorizes each and every one of its actions.[80] This highlights an important principle, namely that government is a creature of the constitution and possesses only the powers recognized in that constitution. But, though important, it is purely formal. It suggests that the *Rechtsstaat* is merely a legislative state. As Schmitt explains, if everything that the legislative authority dictates is law, then, by this logic, 'every absolute monarchy is also a *Rechtsstaat*, for in it the "law" rules, specifically the will of the king'.[81]

Schmitt here recognizes that 'if the "rule of law" should retain its connection with the concept of the *Rechtsstaat*, it is necessary to incorporate certain *qualities* into the concept of law, through which it is possible to distinguish a *legal norm* from a *command* based on mere will or a *measure*'.[82] The rule of law, he argues, must be distinguishable from the rule of persons, 'whether it is an individual person, an assembly, or body whose *will* takes the place of a general norm that is equal for all and determined in advance'.[83] The rule of law implies, in short, that law must be understood as a norm of general character, that law is not essentially *voluntas* but *ratio*.

Only when these intrinsic qualities of law are recognized can we move from government ruling by means of law (ie, in accordance with edicts of the legislative authority) and to government that is also subject to law (ie, subject to a framework of general norms). What, then, are these intrinsic qualities that meet the standards implied by this principle of the rule of law?

The answers jurists have offered exhibit a considerable degree of consensus. The classic formulation is provided by Lon Fuller's specification of eight formal qualities that are intrinsic to the idea of law. These are that laws should (i) take the form of general rules, which should (ii) be publicly promulgated and (iii) be of prospective effect. The rules should also (iv) be clear and understandable, (v) exhibit a degree of consistency or freedom from contradiction, (vi) maintain a degree of constancy over time and (vii) not demand action which it is impossible to perform. Fuller argues finally that (viii) there should be a significant degree of congruence between the rules as promulgated and their enforcement by officials.[84]

[80] See, eg, the classic English case of *Entick v Carrington* (1765) 19 St Tr 1030 in which the king's messengers, having relied on a warrant issued by the Secretary of State, were successfully sued in trespass for search of plaintiff's house and seizure of property. Rejecting the argument of 'State necessity', the court held that if the government possessed lawful authority 'it will be found in our [law] books. If it is not found there, it is not law'.

[81] Carl Schmitt, *Constitutional Theory* [1928] Jeffrey Seitzer (trans) (Durham, NC: Duke University Press, 2008), 138.

[82] Ibid (emphasis in original). Note also Oakeshott's analysis of the distinction between rules and commands: above 327.

[83] Schmitt, above n 81, 139.

[84] Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 2nd edn, 1969), ch 2.

With minor variation, these qualities are also highlighted by many jurists.[85] Fuller claims that these are 'moral' qualities, but in the light of Oakeshott's argument about the nature of 'moral association', Fuller's criteria are best understood as elaborating conditions of rule-based association. We understand them as moral qualities, in the same way we understand games as being constituted by their rules. However, since Fuller regards law as 'the enterprise of subjecting human conduct to the governance of rules',[86] these qualities can just as readily be understood as functional or prudential criteria; serious failure to comply with these criteria would make it impossible to subject human conduct to rules, thereby rendering the rule system ineffective. Just as it might be said that a knife is not a knife unless it has the ability to cut, so too must law be capable of guiding behaviour. For this reason, Raz has argued that although adherence to these standards is a virtue, it is a virtue of an instrumental nature and is 'not a moral virtue as such'.[87]

Raz elaborates this point by claiming that although 'the rule of law is an inherent virtue of the law', it is merely one virtue—one aspiration—among several.[88] Adherence to the rule of law in this sense stands in opposition to 'arbitrary power',[89] and thereby promotes (a particular conception of) individual liberty.[90] But Raz claims that this virtue of a legal system is 'not itself an ultimate goal'.[91] Conformity to these qualities, hence conformity to the rule of law, may make the law 'a good instrument for achieving certain goals' but 'sacrificing too many social goals on the altar of the rule of law may make the law barren and empty'.[92] Raz here implicitly accepts the point about the modern state being more than (in Oakeshott's language) moral association; he recognizes that it also exists to meet certain social purposes. Consequently, legal systems will, of their nature, accommodate tensions between the rule of law and other values and goals. Conformity to the rule of law—or, more precisely, rule by law—can therefore only be 'a matter of degree, and though, other things being equal, the greater the conformity the better—other things are rarely equal'.[93]

By treating Fuller's qualities as prudential criteria, as Raz does, the idea of 'the rule of law' is drawn into a closer alignment with that of 'rule by law'. But is this justified? Mindful of Oakeshott's warning of the error in too readily reducing rule-based

[85] See, eg, FA Hayek, *The Constitution of Liberty* (London: Routledge, 1960), ch 10; Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), ch 11; Lawrence Solum, 'Equity and the Rule of Law' in Ian Shapiro (ed), *The Rule of Law: Nomos XXXVI* (New York: New York University Press, 1994), ch 6.

[86] Fuller, above n 84, 106. [87] Raz, above n 85, 226. [88] Ibid.

[89] Dicey, above n 10, 198; Raz, above n 85, 219–220.

[90] Dicey, above n 10, 202: 'freedom of person is not a special privilege [conferred by a constitution] but the outcome of the ordinary law of the land enforced by the Courts'; Hayek, above n 85, 153: 'The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free'. See further Charles Taylor, 'Kant's theory of freedom' in his *Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985), vol 2, 318–337.

[91] Raz, above n 85, 229. [92] Ibid. [93] Ibid, 228.

conduct to prudential considerations, Fuller's criteria need to be carefully examined. Some uncertainty becomes evident with respect to the qualities that Fuller identifies as constituent elements of 'rule of law' ordering. The first six qualities are purely formal characteristics of rules: rule-based order, Fuller claims, should consist of general, public, prospective, clear, consistent, and stable rules. These are the conditions of authenticity of rule order; they are, in Oakeshott's terminology, conditions of *lex*. But the last two qualities—that rules should not require the impossible and that there should be a degree of congruence between rules and their enforcement—do not refer to qualities of rules *stricto sensu*. These latter criteria seek to align rules to conditions of compliance. They are therefore not so much attributes of *lex* as social conditions of efficacy, in that, rather than being inherent qualities of rules, they are qualities that a rule-order achieves only in a particular social context.

If general conditions of efficacy are to be included in these rule of law qualities, then Fuller's are too limited. Raz notes, for example, that the conditions of impartial and effective enforcement of the rule-order are essential criteria of the rule of law. These include: respect for the principle of judicial independence, which is the precondition of impartial administration of the rules; adherence to the principles of adjudicative fairness, which ensures the integrity of rule-based dispute-resolution; establishment of judicial review of governmental action, which protects against the erosion by governments of the rule-based regime; and ease of citizen access to the courts, which safeguards their rights.[94] These are basic institutional conditions that bolster the formal qualities of rule-based order, converting it into an operative regime animated by the ideal of the rule by law. If this is correct, then Fuller's eight qualities of the rule of law fall between two stools. If they are related primarily to the conditions of *lex*, these qualities, by incorporating efficacy conditions, are over-inclusive. Yet if the qualities of the rule of law must include conditions of efficacy, then Fuller's—by ignoring the institutional arrangements that bolster formal rule-based action—are too limited.

Most jurists who seek to make sense of the principle of the rule of law start from the idea of rule *by* law. Viewing the threat of 'arbitrary' governmental action as the main threat to liberty, and thereby revealing their classical liberal convictions, they first develop a concept of law as a system of rules and then elaborate the institutional conditions that protect the integrity of that rule system. This concept of the rule of law makes no reference to more general constitutional values, such as those that flow from democracy or broader ideas of social justice. In this sense, formal rule of law qualities are not incompatible with dictatorship.[95] This concept serves mainly to identify the virtues of a rule-system, as differentiated from orders and commands, and to outline the conditions under which this system of legal rules can operate free from political manipulation.

[94] Raz, above n 85, 216–217.

[95] See Robert Barros, 'Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile' in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), 188–219.

Rule of law

The concerns generated by a 'rule by law' perspective can be contrasted with a more political aspect of the rule of law often advocated by liberals. Rather than elaborating the conditions of *lex* (or even the *jus* of *lex*), this political concept of the rule of law aims to specify the conditions of legitimate political rule.

As with rule by law, this political concept (hereafter, the *doctrine* of the rule of law) is grounded on classical liberal convictions. While the ideal of rule by law is driven by the objective of curbing arbitrariness in the regime of positive law, the rule of law doctrine is driven by the objective of curbing arbitrariness across the entire governing regime. Consequently, although the particular form of rule is irrelevant to rule by law, it becomes the central issue for the doctrine of the rule of law. Although rule by law may be compatible with dictatorship, from the doctrinal perspective this form of rule is directly challenged. The doctrine of the rule of law maintains that dictatorship is fundamentally destructive of the values inherent in the concept.

The argument driving this liberal doctrine runs as follows. When governmental power is monopolized, law is used as an instrument of personal rule. And since this is corrosive of liberty, the doctrine must protect against the possibility of dictatorship. The doctrine requires that power be dispersed to protect values inherent in the rule of law. The doctrine's objective is to create a set of constitutional rules to further three key aims: first, to ensure that governmental action is entirely institutionalized; secondly, to ensure that governmental powers are differentiated and dispersed; and, thirdly, to ensure that those exercising governmental authority have incentives not to subvert this institutionalized order.

The rule of law doctrine suggests that a properly designed constitutional regime is one in which the rules establishing and regulating governmental action disperse that power, especially through the separation of legislative, executive, and judicial power. Official powers are enumerated in the constitution and checks are set in place to ensure that office-holders do not find it advantageous to act contrary to their institutional responsibilities. The doctrine seeks both to establish a rule-based constitutional order and, by incorporating incentives that protect against its subversion, ensures that the constitutional order maintains its status. The basic liberal principle behind this doctrine is that of the constitution as 'a machine that would go of itself'.[96]

The doctrine of the rule of law presents itself as 'the rule of rules', the correlative principle of modern constitutionalism based on the doctrine of the separation of powers. Its limitations are evident, not least because, founded on eighteenth-century political convictions concerning limited government, it has little bearing

[96] See Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1987), 16–19.

on governing in the contemporary world. Like rule by law, the doctrine of the rule of law presents itself as an impossible ideal.

V. *Rechtsstaat* or *Staatsrecht*?

The central problem with the concept of the rule of law as developed in liberal philosophy is that it sets up an ideal arrangement for rule systems, whether of positive law or public law, that can never be realized. The problem with such unachievable ideals is that the concept is susceptible to use as an ideological weapon. In the practical world of contemporary government, the rule of law can be deployed for anti-governmental purposes. This type of political strategy takes various forms. It might conceive the state as a form of rule association (Oakeshott's moral association), ignoring its other public purposes. It might seek to limit government to the task of rule-execution. Or it might invoke the rule of law to bolster the status of the judiciary as guardians of rule order, without acknowledging that the judiciary is itself limited to the task of rule-interpretation.

The limitations of the liberal doctrine of the rule of law are particularly evident with respect to the claim that the constitution establishes machinery that can run itself. Just as some external action is needed to set machines in operation, so too must the institutional mechanisms of modern constitutions be driven by social and political action. Perhaps this is the wrong metaphor. Constitutions may not be machines able to run themselves, but neither are they merely the instruments of power-holders. Constitutional rules are not self-generating, nor are they just tools of dominant power groups. Although shaped by the dominant power interests in society, constitutional rules can nonetheless guide, shape, and indeed generate power. It is this power-generating quality of constitutional rules that is often overlooked in classical liberal formulations of the rule of law.

Under the influence of classical liberal ideas, the exercise of power is commonly regarded as a potential restriction on some pre-existing liberty. Liberal formulations of the rule of law tend to treat power and liberty as antagonistic concepts: in the rule by law vision, rule order operates as a counterpoise to 'arbitrary power' and in the political doctrine of the rule of law the objective is to establish a rule framework that divides, limits, and constrains the exercise of governmental power. To develop a more practical and positive account of the concept of the rule of law, we might begin by reassessing the relationship between power and liberty. The most appropriate starting point is to consider the function of constitutional rules in the light of the distinction that philosophers have drawn between regulative and constitutive rules.[97]

[97] See John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969); John Searle, *Mind, Language and Society: Philosophy in the Real World* (New York: Basic Books, 1998), 131–134.

Regulative rules influence behaviour that exists independently of the rule (eg, 'do not run in the school corridors'). But constitutive rules make possible action that cannot take place without the existence of the rule. The clearest illustrations of constitutive rules are those that create games: the game of chess, for example, can only be played by observing the rules on how pieces move across the board. Constitutive rules create certain practices (such as the practice of playing chess) and institutions (the institution of chess). So it could be said that while regulative rules impose restrictions on existing power relations, constitutive rules *create* a set of power relations. Further, while regulative rules might restrict liberty, constitutive rules—by creating an ability to do certain things that could not be undertaken without them (eg, play the game of chess)—are liberty-enhancing.

It is in this distinction that we see the essence of Oakeshott's account of the rule of law as a mode of association: the rule of law makes sense only when political association—the governing relationship—is constituted entirely by the rules that establish and regulate governmental power. But as Oakeshott himself recognizes, this argument about constitutive rules does not readily extend beyond the sphere of games into that of the governing relationship.[98] It is easy to see the way in which constitutive rules establish activities that do not otherwise exist in the material world (eg, playing chess). It is less obvious with a governing relationship of permanent duration, involving the allocation of large-scale material resources, containing a multiplicity of rules of uncertain status, and with no obvious exit option.

The critical issue with respect to the rule of law, then, must be the extent to which the governing relationship is bounded by constitutive rules. Within the political sphere there are obviously certain types of behaviour that are constituted by the rules. Electoral rules, for example, are constitutive of the activity of winning office: voting is a meaningful action only within the context of these rules, and an individual is able legitimately to assume the office of Member of Parliament, prime minister, or president only by virtue of such rules. But even in this case, the activity of voting is recognized as authoritative only because of social acceptance of many background practices concerning constitutional government.[99]

But if the constitutive status of electoral rules is ambivalent, there are other aspects of political or governmental action that cannot be defined with reference

[98] See above 325–326.

[99] See Ignacio Sánchez-Cuenca, 'Power, Rules, and Compliance' in Maravall and Przeworski (eds), above n 95, 62–93, 75: 'It is easy to understand that although voting is completely dependent on electoral constitutive rules, acceptance of the results of the ballot has no obvious parallel in games.... The losing candidate in a presidential contest may decide that the elections must be annulled. If he has the support of the army, he will break the constitutive rules. He will become president despite having lost the elections. He becomes president by sheer force. Obviously, someone could refuse to call him president, because he has not been chosen according to the procedure established by the constitutive rule, but the new ruler, no matter what we call him, will do the kinds of things that the last authentic president did'.

to constitutive rules. Consider, for example, the situation when one state deploys its military forces to invade the territory of another. Under the state's constitution, a formal declaration might be required before engaging in war with another country. But this type of military action can—and does—take place without such a declaration. So the action cannot be described as being constituted by the rule. As Sánchez-Cuenca notes, 'even if there is a constitutive rule that defines what counts as war, the occurrence of war is not very dependent on that rule'.[100] The point is this: in the political sphere, many (perhaps most) constitutional rules are not constitutive rules. In this sphere, adherence to the existing constitutional rules is not a straightforward matter of either playing the game or not, not least because the contested authority of many of these constitutional rules itself becomes part of the game.

Rather than asserting the vital importance of the rule of law and its principles of rule-compliance and equality before the law, a more appropriate starting point might be to acknowledge that certain inequalities are intrinsic to the governing relationship and then ask the basic question: why do rulers (to the extent that they do) comply with the rules? The answer—as supplied by Stephen Holmes—is that people restrain themselves 'either when they are in the grip of moral norms or when they anticipate the advantages of self-restraint'.[101] Holmes suggests that, rather than assume the authority of the norms in this sphere, we might sensibly focus on the advantages of self-restraint. We might, in particular, examine the conditions under which office-holders might come to regard rule constraints as power-enabling.

A key principle, argues Holmes, is that of deniability: 'Shedding responsibilities, downsizing goals to match capacities, is a prudent step for the most Herculean of bosses, commanders, rulers, panjandrums, chiefs'.[102] Control is enhanced, especially in the typical political situation in which problems appear intractable, where office-holders can deny responsibility. Viewed from this perspective many nostrums underpinning the principle of the rule of law are cast in a different light. The continuous differentiation of governmental tasks—such as differentiation between executive and judicial tasks, or between law-finding (judges) and fact-finding (juries)—is a means of maintaining authority. To defend against external threats, argues Holmes, 'prescient rulers will create, train, and finance a military establishment', while in order to defend against internal threats 'they will create, train, and finance a judicial establishment'.[103] The institutionalization of political power and the establishment of rule-based governmental procedures are, in short, methods of maintaining and enhancing governmental authority. Constraints on power generate power.

[100] Ibid, 77; cf John Searle, *The Construction of Social Reality* (New York: Free Press, 1995), 89.
[101] Stephen Holmes, 'Lineages of the Rule of Law' in Maravall and Przeworski (eds), above n 95, 19–61, 24.
[102] Ibid, 26. [103] Ibid, 36.

This account aligns the rule of law (*Rechtsstaat*) with the dynamic that drives the development of public law (*Staatsrecht/droit politique*). Governments rule by means of law because, by maintaining such rule-derived expectations, they foster the allegiance of their citizens, which is, in turn, power-generating. Governments bind themselves to respect constitutional rules largely from self-interest, and they do so only when conditions exist that make constitutional rules self-enforcing.[104] That is, to the extent that rule of law values are maintained, it is because they are perceived as prudential necessities rather than universal moral values. To the extent that the doctrine of the rule of law—the precepts of constitutionalism—is upheld, this is because a regime has been established which obeys Madison's instruction that 'ambition must be made to counteract ambition'.[105] In Madison's words, 'you must first enable the government to control the governed; and in the next place oblige it to control itself'. And although a dependence on the people is 'the primary control on the government', Madison recognizes that 'experience has taught mankind the necessity of auxiliary precautions'.[106]

The rule of law is just one expression of the objective of obliging government to control itself. It is part of the 'auxiliary precautions' needed in government. In this sense, the rule of law forms one aspect of the political theory of constitutionalism. But once constitutionalism is conceived to be a practical working principle of government rather than some universal moral aspiration, the central issue ceases to be that of achieving consensus amongst the citizenry on the moral authority of the principle. Instead, constitutionalism is seen to raise a major problem of social co-ordination. From this perspective, constitutional rules not only establish a set of governing institutions; they also endow those institutions with particular interests. The challenge is that of establishing an institutional arrangement with the potential to establish a system of countervailing powers such that it is able to function in a way that bolsters mutual respect for the rules.[107]

Such constitutional arrangements work not because they are required for the realization of some universal moral consensus, the achievement of the rule of law, or fulfilment of the ideals of the *Rechtsstaat*. They operate through a political logic, the workings of political right (*droit politique*), or *Staatsrecht*. Far from exhibiting some moral consensus, such arrangements work because the interests of citizens vary and there is no authoritative metric for resolving these differences.

[104] For the political scientist's modelling of these conditions, see Barry Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91 *American Political Science Review* 245–263.

[105] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* [1788] Isaac Kramnick (ed) (London: Penguin, 1987), No 51 (Madison), 319.

[106] Ibid, 320.

[107] This is similar to what Dahl called 'polyarchy': Robert Dahl, *Polyarchy* (New Haven, CT: Yale University Press, 1971), ch 1: polyarchy is a system in which government are selected through elections and eight conditions of polyarchy (freedom of association, expression, free elections, etc).

Constitutional arrangements are co-ordination mechanisms that enable citizens, despite their differences, to work in concert and to mutual advantage.[108] The arrangements work well only if they are able to garner the support needed to ensure resistance to any intended breach of the basic constitutional rules. And such support rests primarily on the type of prudential political reason that is implicit in the workings of political right.

[108] Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999), esp ch 3: 'A constitution is not a contract... its function is to resolve a problem that is prior to contracting by first coördinating us.... [I]n coordination theory the issue is not that we did agree but that our incentives and those of virtually everyone are to go along once a particular coordination is established. *Coordination theory is primarily a theory of workability*, not of normativity or obligation' (at 87: emphasis in original).